Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

LENORA SPAIN, LOUIS HOMESY, WALTER KOZA, THOMAS RICHARD, WILLIAM NAULT, MATTHEW DEMAS, MICHAEL ADAMS, MICHAEL GROVE, LISA HAWKINS, GARY CASTIGLIONI, CHERYL ADAMS, THOMAS RICHARD, MELISSA RAPA, RICHARD WAUGH, WELDON ADAMS, RONALD RING, PATRICIA ADAMS, ELIZABETH TARGEE, MATHEW VAN WINKLE, BRENT ADAMS, ROBERT RAVITZ, TINA LEVESQUE, CARRIE BURKE, WILLIAM CONNORS, DAVID TAYLOR, CHRISTOPHER MORRIS AND KATHLEEN MARTINS,

Petitioners,

vs.

DEMETRIOS HASEOTES, JOHN DROLETTE, ROBERT LANGFORD, JAMES MUMMA, APRIL GREEN, LILY BENTAS, BRYON HASEOTES, JOHN PECK, GEORGE HASEOTES, PETER PANTAZELOS, MARK CURRIER, MARGE OLSEN, WENDY OLSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., FRED BEISSNER AND HARRIET ANTHONY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil RICO cause of action accrues when a plaintiff discovered or should have discovered the injury he suffered resulting from one act of racketeering activity or whether it accrues after the plaintiff can allege a pattern of racketeering activity as well.

2. Whether the Seventh Amendment precludes a district court from denying class members the opportunity to opt out of a class action, thereby denying them their right to a jury trial, for the reason that they filed proofs of claim in a bankruptcy court.

3. Whether that district court has the power to enjoin class members from prosecuting their claims in this subsequent action when they were never parties in the prior action and they had excluded themselves from the plaintiff class.

4. Whether those class members who filed proofs of claim may collaterally attack the order in the prior action enjoining prosecution of their claims in the subsequent action.

5. Whether the Massachusetts statute on fraudulent concealment applies to the tolling of the plaintiffs' state law claims when the defendants did not disclose their policy of interrogating employees without evidence of wrongdoing.

6. Are the defendants precluded from relitigating the issue of whether the plaintiffs' claims are barred by the statute of limitations, when a district court determined in a prior action that its judgment, consented to by the defendants, was binding on all former employees of Cumberland Farms, Inc. who were subjected to interrogation from October 15, 1970 through May 1, 1992?

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Petitioners Lenora Spain, Louis Homsey, Walter Koza, Thomas Richard, William Nault, Matthew Demas, Michael Adams, Michael Grove, Lisa Hawkins, Gary Castiglioni, Kathleen Martins, Cheryl Adams, Melissa Rapa, Richard Waugh, Weldon Adams, Ronald Ring, Patricia Adams, Elizabeth Targee, Matthew Van Winkle, Brent Adams, Robert Ravitz, Tina Levesque, Carrie Burke, William Connors, David Taylor and Christopher Morris respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on June 9, 1997. A petition for rehearing was denied on September 3, 1997.

OPINIONS BELOW

The United States District Court for the District of Massachusetts ordered judgment for the defendants, dismissing the petitioners' claims in *Lenora Spain, et al. v. Demetrios Haseotes, et al.*, No. 93-11725-JLT, on May 2, 1995 (Appendix D, 13a). It issued a substitute order on August 9, 1995 (Appendix C, 7a). On September 4, 1996, the United States Court of Appeals for the First Circuit dismissed the appeals of eleven petitioners who had been enjoined from prosecuting their claims (Appendix B, 4a). It affirmed the judgment of dismissal on June 9, 1997 in an unpublished opinion (Appendix A, 1a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 9, 1997 and denied a petition for rehearing on September 3, 1997. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Seventh Amendment provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

2. Massachusetts General Laws c. 260, § 12 provides:

> Fraudulent concealment; commencement of limitations
>
> If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

3. Federal Rule of Civil Procedure 65(d) provides in pertinent part:

> Every order granting an injunction . . . is binding only upon the parties to the action . . . .

STATEMENT OF THE CASE

On December 24, 1986, former Cumberland Farms, Inc. ("CFI") employees filed a class action lawsuit in the United States District Court for the District of New Jersey, *Curley v.*

CFI, No. 86-5057. The crux of the complaint was that the defendant officers and employees of CFI carried out a scheme by which low level employees were wrongfully accused of stealing and coerced into signing confessions through threats, including that of being arrested.

Procedure No. 203-5, TERMINATION OF EMPLOYEES, promulgated in 1972 and never rescinded, spelled out the Cumberland Farms policy of making up for inventory losses by having CFI loss prevention specialists plan with area supervisors to obtain confessions from employees. It required CFI supervisors to terminate managers who could not control inventories unless the manager could show that the inventory was affected by a subordinate who confessed to the dishonesty.

The Director of the CFI Loss Prevention Department directed the interrogation of approximately 40,000 employees and the production of confessions from more than 20,000. His 1985 Memorandum Re: Productivity, Standards and Job Requirements — never rescinded — required each loss prevention specialist to produce an absolute minimum of 30 interrogations per month. He made it clear that interrogations were the primary responsibility and that CFI did not have the luxury of investigation.

CFI filed a chapter 11 bankruptcy petition on May 1, 1992 in the United States Bankruptcy Court for the District of Massachusetts, *In re CFI*, No. 92-41305-JFQ. Eleven of these plaintiffs filed proofs of claim in June of 1992.

On June 22, 1993, the *Curley* parties reached a preliminary settlement. Terms of the settlement included: (1) a class would be certified for settlement purposes consisting of former CFI employees who were the subject of questioning or attempted questioning from October 15, 1970, the date the RICO Act went

into effect, until May 1, 1992; and (2) the parties would seek approval from the bankruptcy court for a mandatory non-opt out class consisting of all individuals who filed proofs of claim related to CFI's loss prevention practices.

The Cumberland Farms defendants agreed to compensate over 37,000 class members who were subjected to interrogation, paid money to Cumberland Farms, were charged with a criminal offense, were arrested, were acquitted, or received treatment by a mental health professional as a result of Cumberland Farms' loss prevention policies and procedures. CFI agreed to not oppose expungement of criminal convictions resulting from its policies.

On July 10, 1993, the petitioners moved to intervene in the *Curley* case as plaintiffs. The *Curley* court denied the motion for the reason that the petitioners could opt out of the class. They opted out of the class in valid and timely fashion on August 27, 1993.

On August 30, 1993, the bankruptcy court approved a joint motion by the debtor, CFI, and the *Curley* plaintiffs for a mandatory non-opt out class of former CFI employees who filed proofs of claim in *In re CFI*. In August of 1993 the petitioners filed a class action in the United States District Court for the District of Massachusetts, *Lenora Spain, et al. v. Demetrios Haseotes, et al.*, No. 93-11725. They did not name CFI as a defendant. They alleged that the defendants, CFI officers and employees, conspired to make up for inventory losses by accusing employees of stealing from CFI's stores. They claimed the defendants, almost always without evidence of wrongdoing, tricked and threatened employees into writing out and signing confessions. They sought compensation for false imprisonment, abuse of process, malicious prosecution, defamation, and for violations of the Massachusetts Civil Rights Act, of the RICO Act, and of ERISA.

The *Curley* court issued a Final Order and Judgment approving the class settlement on September 8, 1993. The order stated:

> 1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class.

On May 4, 1994, the *Curley* court issued an Order Entering Injunctive Relief and Holding Party in Civil Contempt (Appendix E, 14a). The order enjoined the eleven petitioners who filed proofs of claim in *In re CFI* from prosecuting their claims against CFI or any of its past or present owners, directors, officers, employees, agents or attorneys. The *Curley* court concluded that each of the eleven was a member of the settlement class based on the bankruptcy court's order approving the mandatory non-opt out class composed of those who filed proofs of claim in *In re CFI*. The injunctive order did not mention the 15 petitioners who excluded themselves from the settlement class and did not file proofs of claim in CFI's bankruptcy case. The Court of Appeals for the Third Circuit affirmed the *Curley* court's decision.

The United States District Court for the District of Massachusetts ordered the dismissal of the *Spain v. Haseotes* action and entered judgment for the defendants on May 2, 1995. On August 9, 1995, it found in the substituted Proposed Order submitted by the defendants that: (1) the eleven plaintiffs who submitted proofs of claim to the bankruptcy court were bound by the *Curley* settlement; and (2) the claims of most of the plaintiffs were barred by the statute of limitations.

On September 4, 1996, the United States Court of Appeals for the First Circuit ordered the dismissal of the appeals of the eleven petitioners who filed proofs of claim in the bankruptcy case. It found that they had a full opportunity to litigate the question concerning their membership in the *Curley* class and could not raise it again.

The First Circuit affirmed the dismissal of the complaint of the plaintiffs-appellants on June 9, 1997. It decided that Massachusetts law would apply to the statute of limitations of the state law claims. It saw no reason to apply the doctrine of fraudulent concealment.

REASONS FOR GRANTING THE WRIT

I.

EACH PLAINTIFF WAS UNABLE TO ALLEGE A PATTERN OF RACKETEERING ACTIVITY UNTIL HE DISCOVERED THAT THE DEFENDANTS CARRIED OUT A POLICY OF WRONGFULLY ACCUSING THOUSANDS OF EMPLOYEES OF STEALING.

In *Agency Holding Corp. v. Malley Duff & Assoc.*, 483 U.S. 143 (1987), this Court established a four-year statute of limitations for RICO civil enforcement actions. It did not decide the appropriate time of accrual for a RICO claim. It expressed a desire for uniformity among the states and for a reduction in litigation, as well as to avoid forum shopping and uncertainty for parties.

This Court can reduce litigation and forum shopping by establishing a uniform rule of accrual for civil RICO actions. The First, Second, Fourth, Fifth, Seventh, and Ninth Circuits follow the injury discovery rule. *Rodriguez v. Banco Cent.*, 917

F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *LaPorte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996). The civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action. A new cause of action accrues for each new injury, even if the RICO violation causing the injury happened more than four years before. The plaintiff need not discover that the injury is part of a pattern of racketeering activity for the period to begin to run.

The Sixth, Eighth, Tenth, and Eleventh Circuits follow the injury and pattern discovery rule, under which the plaintiff must discover or be in a position to discover the existence of a pattern of racketeering activity, in addition to the existence of the injury, for the limitations period to begin to run. *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied sub nom. Barnett Banks, Inc. v. Konstand*, 500 U.S. 910 (1991).

The Third Circuit follows the last predicate act rule. It provides that the accrual period runs from the time the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988).

The defendants concealed their policy of coercing

confessions from employees without evidence. Each plaintiff knew that he was injured by the defendants' confession policy. He was unable to bring a RICO claim where he had no knowledge of other predicate acts carried out by the defendants. Not until August of 1993 when *Curley* class members were notified of the class action settlement could the plaintiffs learn that CFI had a policy of coercing confessions from employees. Without accrual not starting until the plaintiffs discover the pattern of racketeering activity, the perpetrators of racketeering acts could avoid liability to their victims.

II.

REJECTION OF THE PLAINTIFFS' RIGHT TO OPT OUT OF THE *CURLEY* CLASS, FOR THE SOLE REASON THAT THEY FILED PROOFS OF CLAIM IN A BANKRUPTCY COURT AGAINST CUMBERLAND FARMS, INC., ONE OF THE *CURLEY* DEFENDANTS, DENIES THOSE PLAINTIFFS THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S 797, 812 (1985), this Court decided that absent plaintiff class members must be granted the opportunity to opt out of a class action. These plaintiffs have a right to a jury trial where their claims are legal in nature and involve a matter of private right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). The Seventh Amendment precludes the *Curley* court from denying the plaintiffs the opportunity to opt out of the *Curley* class and to have a jury trial. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990).

Filing proofs of claim in the bankruptcy court was the only means of recovering from Cumberland Farms, Inc., which had filed a bankruptcy petition. The plaintiffs should not have to

choose between the loss of the right to a jury trial and the loss of any right of recovery against the bankrupt estate.

III.

THE *CURLEY* COURT LACKED JURISDICTION OVER THOSE CLASS MEMBERS WHO EXCLUDED THEMSELVES FROM THE CLASS AND WHO WERE NEVER PARTIES IN THE *CURLEY* ACTION.

These plaintiffs were never parties in the *Curley* action. The *Curley* court denied their motion to intervene on the grounds that they could exclude themselves. They did exclude themselves. Without subject matter jurisdiction over class members who opted out and without jurisdiction over nonparties, the *Curley* court lacked authority to enjoin these plaintiffs from prosecuting their claims. Fed. R. Civ. P. 65(d); *Ins. Corp. of Ireland v. Compagnie des Bauxities*, 456 U.S. 694, 702 (1982).

IV.

LACKING JURISDICTION OVER CLASS MEMBERS WHO WERE NOT PARTIES AND WHO OPTED OUT OF THE *CURLEY* ACTION, THE *CURLEY* COURT'S ORDER ENJOINING PROSECUTION OF THESE PLAINTIFFS' CLAIMS WAS A NULLITY AND SUBJECT TO COLLATERAL ATTACK.

The collateral bar rule prevents attack on an erroneous order or judgment. It does not insulate void orders or judgments from collateral attack. *United States v. United Mine Workers*, 330 U.S. 258, 289-95 (1947). The order of the *Curley* court enjoining proceedings in this action is clearly subject to collateral attack where it lacked jurisdiction over these plaintiffs. *Matter of Providence Journal Co.*, 820 F.2d 1342, 1346 (1st Cir. 1986).

V.

THE MASSACHUSETTS STATUTE ON FRAUDULENT CONCEALMENT APPLIES TO THE TOLLING OF THE PLAINTIFFS' STATE LAW CLAIMS WHERE THE DEFENDANTS FAILED TO DISCLOSE THEIR POLICY OF INTERROGATING EMPLOYEES WITHOUT EVIDENCE OF WRONGDOINGS, THE PLAINTIFFS HAD NO MEANS OF DISCOVERING THE POLICY, AND THE DEFENDANTS HAD A DUTY TO DISCLOSE THE POLICY TO THE PLAINTIFFS.

The First Circuit applied Massachusetts law to the plaintiffs' state law claims. It erred in not applying the doctrine of fraudulent concealment to toll the statute of limitations as provided in Massachusetts General Laws c. 260, § 12. The defendants owed a fiduciary duty to the plaintiffs where the defendants were vastly more powerful, where the defendants abused the disparity in power to their own benefit and where the defendants were unjustly enriched. *Warsofsky v. Sherman*, 326 Mass. 290, 293, 93 N.E. 2d 612, 615 (1950). The catalyst in transforming the relationship into a fiduciary one was the defendants' knowledge of the plaintiffs' reliance on them. *Broomfield v. Kosow*, 349 Mass. 749, 755, 212 N.E. 2d 556, 560 (1965). A fiduciary is a person having duties involving good faith, trust and candor towards another. *Starr v. Fordham*, 420 Mass. 178, 183, 648 N.E. 2d 1261, 1265 (1995).

The plaintiffs provided uncontroverted evidence that the defendants had a policy of accusing employees of stealing without cause to induce the employees into giving false confessions, proving that there was fraudulent concealment. *Danca v. Taunton Sav Bank*, 385 Mass. 1, 8, 429 N.E. 2d 1129, 1133 (1982). The defendants breached their duty to the plaintiffs to exercise good faith and to disclose all material facts.

Compagnie de Reassurance v. New England Reinsur., 57 F.3d 56, 73 (1st Cir. 1995). Breach of a duty to reveal facts constitutes fraudulent concealment and tolls the statute of limitations. *Riley v. Presnell*, 409 Mass. 239, 244, 565 N.E. 2d 780, 785 (1991). In addition the period of limitations was tolled under section 12 where the defendants committed affirmative acts with the intent to deceive. *Stetson v. French*, 321 Mass. 195, 198, 72 N.E. 2d 410, 412 (1947).

VI.

HAVING CONSENTED TO A JUDGMENT IN A PRIOR ACTION WHICH WAS BINDING ON ALL FORMER CUMBERLAND FARMS, INC. EMPLOYEES WHO WERE SUBJECTED TO INTERROGATION FROM OCTOBER 15, 1970 THROUGH MAY 1, 1992, THE DEFENDANTS ARE PRECLUDED FROM RELITIGATING THE ISSUE OF WHETHER THE PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The defendants consented to the judgment of the United States District Court for the District of New Jersey in the *Curley* case. The *Curley* court certified a class composed of all Cumberland Farms, Inc. employees subjected to questioning from October 15, 1970 through May 1, 1992. The judgment bound all members of the class except those who opted out. The doctrine of collateral estoppel precludes relitigating the issue of whether the plaintiffs' claims are barred by the statute of limitations. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172 (1984). The First Circuit has determined that four elements must be present for issue preclusion. Those elements are present here: (1) the issue is the same here and in *Curley;* (2) the issue was actually litigated; (3) the issue was determined by a valid and final judgment; and (4) the determination was

essential to the *Curley* judgment. *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987).

The issue of the statute of limitations was "actually" decided even if it was not explicitly decided in *Curley* where it constituted a necessary component of the decision reached. *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 31 (1st Cir. 1994). The First Circuit gives collateral estoppel effect to settlements as in *Curley* where it is clear that the parties intended their agreement to have that effect. *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 6 (1st Cir. 1992). Collateral estoppel is appropriate to bar the defendants from raising the issue of the statute of limitations where they had a full and fair opportunity over seven years to litigate the matter in the *Curley* case. *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1530

LENORA SPAIN, ET AL.,

Plaintiffs, Appellants,

v.

DEMETRIOS HASEOTES, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before

Selya, Boudin and Stahl,
Circuit Judges.

Stanley R. Cohen on brief for appellants.

Philip J. Moss and *Moon, Moss, McGill & Bachelder, P.A.* on brief for appellees.

JUNE 9, 1997

Appendix A

Per Curiam. After carefully reviewing the record and the parties' briefs, we *affirm* the judgment of the district court dismissing the complaint of the plaintiffs-appellants. In so doing, we essentially rely on the reasoning contained in that court's order, dated August 9, 1995. We add only the following comments.

The state common law claims of the plaintiffs are governed by state law. In cases based on diversity of citizenship or on pendent jurisdiction, the federal district court must apply the forum state's choice-of-law rules. *See Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Rogers* v. *Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989). Thus, we look to Massachusetts conflicts law to determine what limitations period it would apply. Massachusetts, in turn, uses "the traditional rule that the local law of the forum determines whether an action is barred by a statute of limitations." *Hemric* v. *Reed & Prince Mfg. Co.*, 739 F.2d 1, 2-3 (1st Cir. 1984) (applying the Massachusetts statute of limitations to a claim based on a tort which occurred in North Carolina); *Cosme* v. *Whitin Mach. Works, Inc.*, 417 Mass. 643, 645, 632 N.E.2d 832, 834 (1994) (Massachusetts considers statutes of limitations as procedural and, as the forum state, applies its own law).

The limitations period for torts in Massachusetts is three years. *See* M.G.L.c. 260, § 2A. Similarly, a three-year limitations period governs plaintiffs' claims based on the Massachusetts Civil Rights Act. *Id.* § 5B. Because the case at hand was commenced more than three years after all of the plaintiffs' tort claims accrued, these claims are time-barred. We can see no reason to apply the doctrine of fraudulent concealment in the circumstances of this case.

Appendix A

The judgment of the district court is *affirmed* and all pending motions are therefore *denied* as moot.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED SEPTEMBER 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1530

LENORA SPAIN, ET AL.,

Plaintiffs, Appellants,

v.

DEMETRIOS HASEOTES, ET AL.,

Defendants, Appellees.

No. 95-1540

CHERYL ADAMS, ET AL.,

Plaintiffs, Appellants,

v.

KEVIN BURKE, ET AL.,

Defendants, Appellees.

Before

Torruella, *Chief Judge*,
Cyr and Stahl, *Circuit Judges*.

ORDER OF COURT

Entered September 4 , 1996

Appendix B

Appellees have moved to dismiss the appeals of eleven appellants in these consolidated cases. Appellants oppose the motion on essentially three grounds, each of which we reject for the following reasons:

1. Appellants are barred by the release contained in the settlement and final order in *Curley* v. *Cumberland Farms Dairy, Inc.*, No. 86-5057 (D.N.J. 1993), from pursuing their claims in the cases on appeal. The New Jersey district court decided that appellants were class members and subject to the settlement and release when it issued an injunction ordering appellants to comply with the *Curley* settlement. The Court of Appeals for the Third Circuit affirmed the district court's decision. *See Curley* v. *Cumberland Farms Dairy, Inc.*, No. 94-5306, slip op. at 4, 9 (3d Cir. 1995). Appellants had argued in the New Jersey proceedings, as they do now, that they had opted out of the *Curley* class. Because they had a full opportunity to litigate the question concerning their membership in the *Curley* class, they may not raise it again. *See Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980). *See also Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991) (where plaintiffs in one action litigated and lost on the question whether they were members of a class subject to a class settlement in that action, they are bound by the release contained in the settlement; collateral estoppel bars relitigation of their status as class members in a second action).

2. The conclusion that appellants are members of the *Curley* class and, thus, subject to the release contained in the *Curley* settlement and final order moots their contention that the release in the bankruptcy order of August 30, 1993 only barred their claims against CFI, not the individual appellees. That is, under the *Curley* release, appellants' claims against appellees are barred in any case.

Appendix B

3. A review of the amended complaint in *Adams* v. *Burke* reveals that the § 1983 claims of these eleven appellants are premised on events related to judicial proceedings which were initiated *prior* to the August 30, 1993 bankruptcy order and which plainly relate to appellants' employment at and termination from CFI. Thus, the release contained in the *Curley* settlement bars the prosecution of these § 1983 claims.

Therefore, Appeal No. 95-1540 is summarily *dismissed* and appellants Cheryl Adams, Elizabeth Targee, Richard Waugh, Carrie Burke, Melissa Smith Rapa, Ronald Ring, Patricia Adams, Weldon Adams, Brent Adams, Tina Levesque and Robert Ravitz are summarily *dismissed* from Appeal No. 95-1530. *See* Local Rule 27.1. Appellees' motion for damages under FRAP 38 is *denied*.

So ordered.

By the Court:

WILLIAM H. NG
Clerk.

[cc: Messrs. Cohen, Hayes, Gilmore, Moss]

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED AUGUST 9, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 93-11725-JLT

LENORA SPAIN, et al.,

Plaintiffs,

v.

DEMETRIOS HASEOTES, et al.,

Defendants.

ORDER

August 9, 1995

TAURO, Ch.J.

The court hereby orders as follows:

1. The attached Proposed Order, submitted by the Defendants, is substituted in its entirety for the court's order of April 17, 1995, with the exception that the name "Lisa Hawkins" is deleted from the fourth sentence of paragraph 2.

It is so ordered.

s/ J. Tauro
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
Docket No. 93-11725 JLT

LENORA SPAIN, et al.

Plaintiffs

v.

DEMETRIOS HASEOTES, et al.

Defendants

PROPOSED ORDER

This action is dismissed in its entirety, for the following reasons:

1. Eleven of the plaintiffs (Cheryl Adams, Ronald Ring, Richard Waugh, Brent Adams, Carrie Burke, Patricia Adams, Elizabeth Targee, Melissa Smith Rapa, Robert Ravitz, Weldon Adams and Tina Levesque) are bound by an Order of the United States Bankruptcy Court for the District of Massachusetts to participate in the class-wide settlement of claims in *Curley, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of New Jersey, No. 86-5057 (SSB). The Final Order and Judgment dated September 8, 1993 in that case barred all claims of these plaintiffs against Cumberland Farms, Inc., its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insureds, arising out of the class members' employment with Cumberland Farms. These

eleven plaintiffs appealed from the Final Order and Judgment in *Curley*, and their appeal was denied by the United States Court of Appeals for the Third Circuit, *Curley, et al. v. Cumberland Farms, et al.*, 27 F.3d 556 (3rd Cir. 1994). These plaintiffs did not seek review in the Supreme Court of that decision. However, they have appealed the order of the Bankruptcy Court requiring their participation in the class settlement in *Curley*. That appeal is still pending before another judge of this Court, No. 93-40187XX. In the event that their appeal is allowed, these eleven plaintiffs may apply to this Court for relief from this Order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

2. The RICO and ERISA claims of the foregoing eleven plaintiffs and one other plaintiff (Matthew Van Winkle) have already been adjudicated by this Court and dismissed on the merits (and the RICO claim of one of these plaintiffs, Cheryl Adams, has been dismissed on the merits on two separate occasions in two separate lawsuits by two separate judges of this Court). Accordingly, those claims are dismissed as a matter of *res judicata*. The RICO and ERISA claims asserted by other plaintiffs are also dismissed, based upon the reasoning relied upon by Judges Skinner and Harrington in *Adams v. Cumberland Farms, Inc., et al.*, No. 91-10627-S, and *Ring, et al. v. Haseotes, et al.*, No. 93-10051H, in their respective decisions in those cases, dated July 29, 1992 and April 23, 1993. An independent basis for dismissing the RICO and ERISA claims of Plaintiffs Lisa Hawkins and David Snyder is that these plaintiffs are also members of the *Curley* class, and their claims are barred by the September 8, 1993, Final Order and Judgment in *Curley*. A further, independent basis for dismissing the RICO and ERISA claims of Plaintiffs Michael Adams, Gary Castiglioni, William Connors, Matthew Demas, Michael Grove, Louis Homesy,

Walter Koza, Christopher Morris, William Nault, Thomas Richard, Lenora Spain, David Taylor and Matthew Van Winkle is that their claims are barred by the applicable statutes of limitations.

3. In the *Adams* and *Ring* cases described above, having dismissed the claims grounded in federal law, this Court declined to exercise supplemental jurisdiction over the remaining claims, resulting in a proliferation of additional lawsuits by the same plaintiffs in this Court and the Superior Court of the Commonwealth of Massachusetts. I find that it is appropriate to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1441(c) over the remaining claims in this case, as a matter of discretion, in the interest of judicial economy, convenience, fairness and comity. *Ching v. Mitre Corp.*, 921 F.2d 11, 14 (1st Cir. 1990); *Conway v. Boston Edison Co.*, 745 F. Supp. 773, 778 (D. Mass. 1990); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 351 (1988).[1] *See also*, *Wentzka v. Gellman*, 759 F. Supp. 484 (E.D. Wis. 1991); *Bank of Oklahoma, N.A., Grove Branch v. Island Marina Ltd.*, 918 F.2d 1476 (10th Cir. 1990); *Com. of Mass. v. V & M Management, Inc.*, 929 F.2d 830, 835 (1st Cir. 1991). The state law claims of the following plaintiffs are all barred by the applicable three-year statutes of limitation in Massachusetts and New Hampshire: Cheryl Adams, Michael Adams, Carrie Burke, Gary Castiglioni, William Connors, Matthew Demas, Michael Grove, Lisa Hawkins, Louis Homesy, Walter Koza, Christopher Morris, William Nault, Melissa Smith Rapa, Thomas Richard, Ronald Ring, David Snyder, Lenora

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1. The principles enunciated by the Supreme Court in *Carnegie-Mellon* are applicable both in cases with state law claims pendent to federal law claims and cases with state law claims separate and independent of federal law claims. *Com. of Mass. v. V & M Management, Inc.*, 929 F.2d 830, 835 (1st Cir. 1991).

Spain, Elizabeth Targee, David Taylor, Matthew Van Winkle and Richard Waugh. Accordingly, to the extent that any of these claims are not barred by the class settlement in *Curley*, they are dismissed as time barred.

4. There remain the claims of Plaintiffs Nancy French and Kathleen Martins. However, on May 26, 1994, the Superior Court for Suffolk County, Commonwealth of Massachusetts, granted summary judgment to the defendants in *Waugh, et al. v. Haseotes, et al.*, No. 93-2663, dismissing all claims of Nancy French against the defendants in that case, almost all of whom are defendants in this case as well. French has taken an appeal from that summary judgment to the Massachusetts Appeals Court. Since the claims asserted by French in this case arise out of the same nucleus of operative facts asserted in the *Waugh* case, I am dismissing her claims, without prejudice to her appeal in *Waugh*. It would not be efficient to retain jurisdiction over the state law claims of one plaintiff. Accordingly, the state law claims of Plaintiff Kathleen Martins are dismissed without prejudice.

5. Plaintiffs have moved to amend the already amended complaint to join 18 additional plaintiffs. The Court need not allow an amendment which would be futile. *Correa-Martinez v. Arrillaga* Belendez, 903 F.2d 49, at 59 (1st Cir. 1990). Proposed plaintiffs William Belcher, Rochelle Belton, John Burbine, Carol Dyer, Michael Farris Galante, Linda Smith Harris, Joseph Ippolito, Richard Kureczka, Anthony Maxham, Carol Murphy, Esther Roche, Federick Sena, Jr. and Shirley Toledo are all members of the settlement class in *Curley*. Accordingly, their claims are barred by reason of the September 8, 1993, Final Order and Judgment in that case. In addition, the claims of these same plaintiffs are barred by applicable statutes of limitation.

Appendix C

There remain proposed plaintiffs Laticia Salvatore, Sherryl Gordon Forget, Richard Keller, Jr., Mark Morin and Brenda Sanborn. The RICO and ERISA claims of these plaintiffs are deficient for the reasons stated by this Court in the *Adams* and *Ring* cases cited above. Salvatore is already a plaintiff in a related case pending in Norfolk Superior Court, *Judson, et al. v. Cumberland Farms, Inc., et al.*, No. 94-12536. It would not be an efficient use of this Court's resources to retain jurisdiction over the state law claims of the other proposed plaintiffs. Accordingly, the motion to amend is denied.

Judgment of dismissal shall issue.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MAY 2, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 93-11725-JLT

LENORA SPAIN, ET AL

V.

DEMETRIOS HASEOTES, ET AL

ORDER

TAURO, CH.J.:

Pursuant to the Memorandum and Order entered on April 25,1995, judgment is entered for defendants and this action is DISMISSED as to all defendants WITH PREJUDICE.

SO ORDERED.

By the court,

s/ Mary L. Coughlin
DEPUTY CLERK

Dated: May 2, 1995

APPENDIX E — ORDER ENTERING INJUNCTIVE RELIEF AND HOLDING PARTY IN CIVIL CONTEMPT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 86-5057 (SSB)

LANCE CURLEY, et al.,

Plaintiffs,

vs.

CUMBERLAND FARMS, INC., et al.,

Defendants.

ORDER ENTERING INJUNCTIVE RELIEF AND HOLDING PARTY IN CIVIL CONTEMPT

This matter having been brought before this Court upon the application of defendants (except Alger) and Wilentz, Goldman & Spitzer, P.C., Nicholas W. McClear, and Robert W. Smith, by and through their attorneys and appearing *Pro Se*, pursuant to an Order to Show Cause: (1) why Cheryl Adams, Richard Waugh, Brent Adams, Ronald Ring, Patricia Adams, Robert Ravitz, Carrie Burke, Elizabeth Targee, Weldon Adams, Tina Levesque, and Melissa Smith Rappa (hereinafter collectively referred to as "Cohen's Clients"), and their counsel, Stanley R. Cohen, Esq., should not be enjoined from prosecuting two suits captioned as: *Cheryl Adams v. Kevin Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B, and *Cheryl Adams, et al. v. Kevin Burke,*

et al., United States District Court for the District of Massachusetts, Docket No. 94-10229(MLW) (hereinafter collectively referred to as the "Two New Suits"); (2) why the courts in which the Two New Suits are pending should not be enjoined; and (3) why plaintiffs' counsel, Stanley R. Cohen, Esq., should not be held in civil contempt of this Court's Final Order and Judgment, entered September 8, 1993; and

The Court having considered the submissions of the parties and having heard arguments presented thereon; and

For the reasons provided in the Court's Opinion of this date;

IT IS on this 2nd day of May, 1994, hereby **ORDERED** as follows:

(1) Cohen's Clients and their counsel, Stanley R. Cohen, Esq., are hereby enjoined from prosecuting the Two New Suits;

(2) Cohen's Clients and Stanley R. Cohen, Esq. are hereby ordered to immediately cease and desist from taking any further actions to prosecute claims of Cohen's Clients against Cumberland Farms, Inc., its affiliates and/or its predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), or any of its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to Cohen's Clients' employment, including termination of their employment, with Cumberland, in *Cheryl Adams v. Cumberland Farms, Inc.*, Essex Superior Court, Docket No. 91-231 (now consolidated with *Waugh, infra*, in Suffolk Superior Court); *Richard Waugh v. Haseotes, et al.*, Suffolk Superior Court Docket No. 93-2663; *Leonora Spain v. Haseotes, et al.*, U.S.D.C.

Docket No. 93-11725 WP; *Cheryl Adams v. Burke, et al.*, Suffolk Superior Court Docket No. 94-0627-B; and *Cheryl Adams, et al. v. Burke, et al.*, U.S.D.C. Docket No. 94-10229 WF.

(3) The United States District Court for the District of Massachusetts is hereby enjoined from continuing to allow the prosecution of the action captioned *Cheryl Adams, et al. v. Kevin Burke, et al.*, United States District Court for the District of Massachusetts, Docket No. 94-10229(MLW);

(4) The Suffolk Superior Court for the Commonwealth of Massachusetts is hereby enjoined from continuing to allow the prosecution of the action captioned *Cheryl Adams, et al. v. Kevin Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B; and

(5) Stanley R. Cohen, Esq. is hereby held in civil contempt of this Court's Final Order and Judgment, entered September 8, 1993, and he is hereby ordered to pay to defendants (except Alger), and Wilentz, Goldman & Spitzer, P.C., Nicholas W. McClear, and Robert W. Smith, the attorneys' fees and costs associated with the defense of the Two New Suits and this application, in an amount to be determined by this Court after consideration of affidavit(s) of services rendered and costs incurred, to be submitted within 10 days of the date of the entry of this Order.

(6) Cohen's Clients and Stanley R. Cohen, Esq., are hereby ordered to comply with the terms of this Court's Final Order and Judgment (hereinafter "Judgment"), entered September 8, 1993 (a copy of which is annexed hereto as Exhibit "A"), including ¶ 6 which enjoins them from instituting or prosecuting, either directly or indirectly, any actions against Cumberland

Appendix E

Farms, Inc. and/or any of the Released Parties (as defined in the Judgment at ¶ 5).

s/ Stanley R. Brotman
HON. STANLEY R. BROTMAN
UNITED STATES DISTRICT COURT

(7)

No. 97-0561

FILED
OCT 29 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

LENORA SPAIN, LOUIS HOMESY, WALTER KOZA, THOMAS RICHARD, WILLIAM NAULT, MATTHEW DEMAS, MICHAEL ADAMS, MICHAEL GROVE, LISA HAWKINS, GARY CASTIGLIONI, CHERYL ADAMS, THOMAS RICHARD, MELISSA RAPA, RICHARD WAUGH, WELDON ADAMS, RONALD RING, PATRICIA ADAMS, ELIZABETH TARGEE, MATHEW VAN WINKLE, BRENT ADAMS, ROBERT RAVITZ, TINA LEVESQUE, CARRIE BURKE, WILLIAM CONNORS, DAVID TAYLOR, CHRISTOPHER MORRIS and KATHLEEN MARTINS,

Petitioners,

vs.

DEMETRIOS HASEOTES, JOHN DROLETTE, ROBERT LANGFORD, JAMES MUMMA, APRIL GREEN, LILLY BENTAS, BYRON HASEOTES, JOHN PECK, GEORGE HASEOTES, PETER PANTAZELOS, MARK CURRIER, MARGE OLSEN, WENDY OLSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN JR., FRED BEISSNER and HARRIET ANTHONY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Memorandum And Order Of The United States District Court For The District Of Massachusetts In The Matter Of *Ronald Ring, et al. v. Demetrios Haseotes, et al.*, No. 93-10051-H Dated April 23, 1993	1a

Respondents request that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the First Circuit primarily because, as set forth below, the Court of Appeals correctly concluded that the claims of 11 of the Petitioners are barred by the settlement and final order in *Curley v. Cumberland Farms, Inc.*, Civil Action No. 86-5057 (D.N.J. 1993), and correctly concluded that the claims of the remaining Petitioners are barred for the reasons relied upon by the district court in its decision dated August 9, 1995.

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek review of two decisions of the Court of Appeals dated, respectively, September 4, 1996 (Petition at 4a), and June 9, 1997 (Petition at 1a). The order dated September 4, 1996 summarily dismissed the appeals of 11 of the Petitioners from a judgment of the District Court for the District of Massachusetts dated May 2, 1995 (Petition at 13a), dismissing their lawsuit against the Respondents. These 11 Petitioners ("11 Petitioners") filed a motion for rehearing with the Court of Appeals on May 29, 1997, which motion was denied on September 5, 1997. The order dated June 9, 1997 dismissed, per curiam, the appeals of the remaining Petitioners ("remaining Petitioners"), based essentially upon the reasons given by the district court in its order dated August 9, 1995 (Petition at 1a, 7a). The motion of the remaining Petitioners for rehearing was denied by the Court of Appeals on September 3, 1997.

B. Statement of Facts[1]

The Petitioners (or various combinations of them) commenced a total of eight (8) lawsuits against the Respondents, in the state and federal courts in Massachusetts:

1. *Cheryl Adams v. Cumberland Farms, Inc., et al.*
   Essex Superior Court, Docket No. 91-231
   (hereinafter "*Adams I*")

2. *Richard Waugh, et al. v. Haseotes, et al.*
   Suffolk Superior Court Docket No. 93-2663
   (hereinafter "*Waugh*")

3. *Cheryl Adams v. Burke, et al.*
   Suffolk Superior Court Docket No. 94-0627-B
   (hereinafter "*Adams V*")

4. *Ronald Ring, et al. v. Haseotes, et al.*
   U.S.D.C. Docket No. 93-10051H
   (hereinafter "*Ring*")

5. *Lenora Spain, et al. v. Haseotes, et al.*
   U.S.D.C. Docket No. 93-11725 JLT
   (hereinafter "*Spain*")

6. *Cheryl Adams, et al. v. Burke, et al.*
   U.S.D.C. Docket No. 94-10229 JLT
   (hereinafter "*Adams VI*")

7. *Eric Judson, et al. v. Cumberland Farms, Inc., et al.*
   Norfolk Superior Court Docket No. 94-12536
   (hereinafter "*Judson*")

---

1. The Statement of Facts in the petition is inaccurate in a number of respects, none of which are material to the Court's disposition of the petition, for the reasons set forth below, under "Argument."

8. *Laetitia Salvatore, et al. v. Cumberland Farms, Inc., et al.*
   U.S.D.C. Docket 95-11170-EFH
   (hereinafter "*Salvatore*")

The eight lawsuits alleged essentially the same claims, arising out of the same transactions. Judgments of dismissal have entered in all eight of these lawsuits. The instant petition concerns only the *Spain* case. However, the 11 Petitioners have previously sought certiorari from the judgments of dismissal in *Adams I, Waugh* and *Adams V*. That petition, docketed as No. 96-1782, was denied by the Court on October 6, 1997. *Cheryl Adams v. Cumberland Farms,* __ S. Ct. __, 1997 WL 274814 (Oct. 6, 1997). The Court's attention also is respectfully directed to the denial of certiorari and to the statement of facts and procedural history set forth at pp.1-5 of the Opposition to Petition For Writ Of Certiorari in *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 387 (Nov. 4, 1996), all or most of which is relevant to consideration of the Petition in this case. Copies of the decisions which are referenced immediately below were included in the appendices of the petitions and the oppositions to the petitions for certiorari in No. 96-300 and No. 96-1782.

The Petitioners are all former employees of Cumberland Farms, Inc. ("CFI"). In 1986, certain other former employees of CFI commenced suit against the company in the United States District Court for the District of New Jersey, which lawsuit was styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB). The plaintiffs in *Curley*, like the Petitioners in this case, alleged injuries arising out of their employment with CFI, which they attributed to misconduct by CFI's loss prevention personnel.

In 1991, CFI filed for protection from creditors pursuant to Chapter 11 of the Bankruptcy Code, in the United States

Bankruptcy Court for the District of Massachusetts. *In re Cumberland Farms, Inc.*, Case No. 92-41305-JFQ.

In 1993 CFI reached an agreement with the plaintiffs in *Curley* to settle the so-called "loss prevention claims" on a class-wide basis. As part of the proposed settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all "loss prevention claimants." The bankruptcy court, over the objection of the 11 Petitioners, granted the joint motion. The 11 Petitioners appealed this order of the bankruptcy court to the United States District Court for the District of Massachusetts, which affirmed. On May 6, 1996, the First Circuit Court of Appeals affirmed the district court's decision, *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146. The 11 Petitioners sought review of that decision in this Court, which denied certiorari (No. 96-300) on November 4, 1996.

The district court in *Curley* approved the parties' class-wide settlement in that case in a Final Order and Judgment dated September 8, 1993. The 11 Petitioners appealed that judgment to the United States Court of Appeals for the Third Circuit, which affirmed it on May 19, 1994. *Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994). Petitioners did not seek certiorari from that decision.

The Final Order and Judgment in *Curley* dismissed with prejudice all claims of the members of the settlement class which were or which could have been asserted in that case against CFI, its owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the class members' employment with CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of

or related to their employment with CFI. In their brief to the Third Circuit, the 11 Petitioners explicitly recognized that the Final Order and Judgment in *Curley* constituted an injunction against further prosecution of their claims against CFI or any of the other Released Parties, by reason of the fact that they had filed proofs of claim in the bankruptcy proceeding. When the district court in *Curley* subsequently issued another order *specifically* enjoining these Petitioners and their attorney, Stanley R. Cohen, from continuing to prosecute the lawsuits against Respondents which are at issue here, the Petitioners again sought review of that order in the Third Circuit, which on January 25, 1995, denied their appeal and affirmed the injunction, *Curley v. Cumberland Farms Dairy, Inc.*, 47 F.3d 1160 (3d Cir. 1995). The 11 Petitioners did not seek certiorari from that judgment, either.

C. Decision of the District Court in This Case

Based on the foregoing history, the district court held that the claims of the 11 Petitioners are barred by the settlement in *Curley* (Petition at 8a). In addition, the court held that the ERISA and RICO claims of these 11 Petitioners, and one other (Van Winkle) were barred as a matter of *res judicata*, having previously been adjudicated and dismissed on the merits in one of the seven other lawsuits brought by the Petitioners (and with respect to Petitioner Cheryl Adams, these claims had been adjudicated and dismissed on the merits in two of the other seven lawsuits, *Adams I* and *Ring*) (Petition at 9a). The court dismissed the ERISA and RICO claims of the remaining Petitioners for the reasons set forth in its previous decisions in *Adams I* and *Ring*. *Id.* As an alternative ground for dismissing the ERISA and RICO claims of 13 of the remaining Petitioners, the court concluded that their claims were barred by the statute of limitations. The court dismissed the pendent state law claims of all but two of the remaining Petitioners as barred by applicable

state statutes of limitation. (Petition at 9a-11a). The court dismissed without prejudice the state law claims of Petitioner Nancy French, on the grounds that her claims had already been adjudicated and dismissed by the Massachusetts Superior Court, and were the subject of an appeal to the Massachusetts Appeals Court. (Petition at 11a).[2] The court dismissed without prejudice the state law claims of the one remaining Petitioner, Kathleen Martins, on the grounds that it would not be efficient to retain jurisdiction over the state law claims of one plaintiff. *Id.*[3]

D. Decision of the Court of Appeals

On September 4, 1996, the Court of Appeals summarily dismissed the appeals of the 11 Petitioners whose claims were extinguished by the settlement in *Curley*. The appeals of the remaining Petitioners were dismissed by the Court of Appeals, *per curiam*, on June 9, 1997, essentially on the grounds relied upon by the district court in its decision dated August 9, 1995.

After petitions for rehearing were denied by the Court of Appeals, this Petition followed.

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2. The Massachusetts Appeals Court subsequently affirmed the lower court's dismissal of French's claims, and French has not joined in this petition for certiorari.

3. Although Martins is named as one of the Petitioners herein, she did not appeal the district court's dismissal of her claims, and none of the Questions Presented or arguments in the petition address the reasons given by the district court for dismissal of her claims.

REASONS FOR DENYING THE WRIT

I.

CLAIMS OF THE 11 PETITIONERS ARE BARRED AS A MATTER OF *RES JUDICATA* BY THE FINAL JUDGMENT IN *CURLEY v. CUMBERLAND FARMS, INC.*, AND THIS COURT'S DENIAL OF CERTIORARI IN NO. 96-300.

Of the six Questions Presented in the petition, the second, third and fourth pertain only to the 11 Petitioners whose claims were extinguished by virtue of the settlement in the *Curley* case. The Court has already rejected a collateral attack on that settlement by these same 11 Petitioners. *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 387 (Nov. 4, 1996). Notwithstanding rejection of their first petition, these same 11 Petitioners brought a second petition for certiorari *Cheryl Adams v. Cumberland Farms, Inc.*, __ S. Ct. __, 1997 WL 274814 (Oct. 6, 1997), in which they attempted to relitigate these same issues, *i.e.*, validity of the *Curley* settlement as a bar to their claims. Respondents respectfully direct the Court to their Opposition to Petition For Writ of Certiorari in No. 96-1782, which sets forth the reasons why the doctrine of res judicata bars relitigation of the 11 Petitioners' attack on the final judgment in *Curley*. The 11 Petitioners should not be permitted a third bite at the apple.

The other arguments set forth in the petition (the first, fifth and sixth of the Questions Presented) pertain only to the remaining Petitioners, and are addressed only to the reliance by the courts below on the statute of limitations as grounds for dismissing the claims of the remaining Petitioners.

II.

THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER WHEN A CIVIL RICO CLAIM ACCRUES FOR PURPOSES OF THE STATUTE OF LIMITATIONS BECAUSE: (a) THE DISTRICT COURT RELIED UPON OTHER GROUNDS, NOT ATTACKED IN THE PETITION, FOR ITS DISMISSAL OF THE PETITIONERS' RICO CLAIMS; AND (b) THE PETITIONERS DID NOT SQUARELY RAISE THIS ISSUE BELOW.

The remaining Petitioners argue that the Court should grant certiorari in this case to resolve a split among the courts of appeal regarding the proper rule for deciding when a civil RICO claim accrues, for purposes of the statute of limitations (Petition at 6-8). As the Court recognized in *Klehr v. A.O. Smith Corp.*, __ U.S. __, 117 S. Ct. 1984 (1997), the majority of the courts of appeal (including the First Circuit), apply the traditional "injury discovery" rule while three of the circuits apply what the Court described as the "injury and pattern discovery" rule.[4] *Klehr*, 117 S. Ct. at 1988-89. In the instant case, the remaining Petitioners urge the Court to resolve this split in the circuits by endorsing the "injury and pattern discovery" rule. However, the statute of limitations was but one of the grounds relied upon by the district court in this case for its decision to dismiss the RICO claims of the remaining Petitioners, and the petition does not assert that it was error for the district to dismiss the RICO claims on those

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4. In describing this split among the circuits, the Petitioners omit any mention of the D.C. Circuit's view on this issue, which is adverse to their position. *Compare* Petition at 6-7 and *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (applying the "injury discovery" rule).

other grounds. Thus, as in *Klehr*, this is not an appropriate case for the Court to resolve the split in the circuits over when a civil RICO claim accrues for purposes of the statute of limitations.

The district court's decision in this case states, in pertinent part:

> The RICO and ERISA claims asserted by other plaintiffs are also dismissed, based upon the reasoning relied upon by Judges Skinner and Harrington in *Adams v. Cumberland Farms, Inc., et al.*, No.91-10627-S, and *Ring, et al v. Haseotes, et al.*, No.93-10051H, in their respective decisions in those cases, dated July 29, 1992 and April 23, 1993.

Appendix to Petition, at page 9a.

The decision of Judge Harrington referred to in the passage quoted above is attached hereto as Appendix A. Among other reasons cited by Judge Harrington for dismissing the RICO claims in that case, he stated that the plaintiffs had failed to state a claim under RICO because "none of them allege an injury to a business interest or property related to a business." The district court adopted this as one of its reasons for dismissing the RICO claims of the remaining Petitioners in this case, and they have not asserted in their petition that it was error for the district court to do so. Thus, even if the Court were to resolve the split in the circuits by adopting the "injury and pattern discovery" rule, as the remaining Petitioners have requested, it would not change the outcome of this case as to these remaining Petitioners.

A further reason for denying certiorari in this case is that the remaining Petitioners never clearly and unequivocally raised this issue to the court below. In support of their contention that

there exists a split in the circuit courts of appeal on this issue, the petition cites the decision in *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990), in which the First Circuit followed the traditional "injury discovery" rule. Petition at pp. 6-7. In their brief to the First Circuit, the remaining Petitioners argued that the statute of limitations should be tolled in their favor because Respondents had "fraudulently concealed" their wrongdoing from the remaining Petitioners, but they did not urge the court of appeals to overrule its decision in *Rodriguez*, and in fact, no mention of *Rodriguez* or of any "RICO accrual rule" appears in their brief to the First Circuit. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. MIT*, 950 F.2d 13, 22 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S. Ct. 1939 (1992); *American Automobile Manufacturers Ass'n, et al. v. Commissioner, Massachusetts Dept. of Environmental Protection*, 31 F.3d 18, 25 (1st Cir. 1994).

The Court should not attempt to resolve the split among the courts of appeal over the appropriate rule for accrual of a civil RICO claim in a case like this, where the issue was not adequately presented to the lower court, and where resolution of this issue will not affect the rights of the Petitioners. Resolution should "wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before [it] attempt[s] to resolve them." *Klehr*, 117 S. Ct. at 1992.

III.

THE COURT SHOULD NOT CONSIDER THE LAST OF THE QUESTIONS PRESENTED IN THE PETITION BECAUSE THIS ARGUMENT WAS NOT RAISED BELOW.

Lastly, the remaining Petitioners argue that collateral estoppel bars the Respondents from raising the statute of

limitations as a defense to their claims. Their argument proceeds as follows: (a) the Respondents were parties to the final judgment in the Curley case; and (b) the issue of the statute of limitations was actually decided in that case, because it constituted a necessary component of the decision reached in that case.

However, this argument was never presented to the district court, and it was raised in the court of appeals for the first time in the Petitioners' reply brief. *American Automobile Manufacturers v. Commissioner*, 31 F.3d at 25; *Pignons S.A.de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983):

> In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed, and appellant generally may not preserve a claim merely be referring to it in a reply brief or at oral argument.

The Court should not consider arguments which were not adequately presented to the lower courts.

Even if this argument had been adequately raised below, it is fundamentally flawed. The issue of whether the statute of limitations barred claims of the plaintiffs in *Curley* was never actually decided in that case, and since the final judgment in *Curley* merely approved a class-wide settlement of claims, the issue of the statute of limitations was not a necessary component of the final judgment of the district court.

Moreover, the Petitioner's collateral estoppel argument is flatly inconsistent with the rule set down by the Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 766 (1974), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 2397-98 (1983): class members who opt out of the class must begin their

individual actions within the time afforded by the statute of limitations, as extended by the finite tolling period between the initiation of the class action and the date that those members opted out. [5]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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5. Thus, the decision cited by the remaining Petitioners in support of their collateral estoppel argument, *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987), is wholly irrelevant to this case.

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN THE MATTER OF *RONALD RING, et al. v. DEMETRIOS HASEOTES, et al.*, NO. 93-10051-H DATED APRIL 23, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.: 93-10051-H

RONALD RING, *ET AL.*,

Plaintiffs

v.

DEMETRIOS HASEOTES, *ET AL.*,

Defendants.

MEMORANDUM AND ORDER

April 23, 1993

HARRINGTON, D.J.

Twelve Plaintiffs have brought suit in this case against 28 Defendant officers, agents, and employees of Cumberland Farms, Inc., pressing seven state and two federal claims. The Plaintiffs allege that the Defendants coerced them into signing false confessions and wrongfully discharged them. The action has come before the Court on the Defendants' Motion to Dismiss.

A court should dismiss a claim under Rule 12(b)(6) only when it appears that the plaintiff can prove no set facts in support

of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making such a ruling, a court must accept all facts pleaded in the complaint as true, drawing all reasonable inferences in the plaintiff's favor. *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). A court need not, however, accept a plaintiff's "bald assertions, unsupportable conclusions, and 'opprobrious epithets.' " *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10 (1944)), *cert. denied*, 483 U.S. 1021 (1987). As the First Circuit has indicated, there is a difference between well-pled factual averments and conclusory allegations:

> More often, facts are susceptible to objective verification. Conclusions, on the other hand, are empirically unverifiable in the usual case. They represent the pleader's reactions to, sometimes called "inferences from," the underlying facts. It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an accepted level of probability, that "conclusions" become "facts" for pleading purposes.

The Dartmouth Review, 889 F.2d at 16. It is with these precepts in mind that we address the Plaintiffs' claims.

Eight of the Plaintiffs[1] assert claims under Section 510 of the Employment Retirement Income Security Act ("ERISA"),

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1. The Plaintiffs asserting ERISA claims are Cheryl Adams, Richard Waugh, Elizabeth Targee, Weldon Adams, Patricia Adams, Tina Levesque, Robert Ravitz, and Brent Adams.

29 U.S.C. § 1140 (1988). Section 510 makes it unlawful for any person to discharge a participant in an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA]." 29 U.S.C. § 1140. No ERISA action lies, however, "where the loss of pension benefits was a mere consequence of, but not a motivating force behind, a termination of employment." *Titch v. Reliance Group, Inc.*, 548 F.Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983); *see also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510."). In their Amended Complaint, the Plaintiffs allege that the Defendants' "unlawful and tortious conduct resulted in [Cumberland Farms] illegally discharging them, pretextually, with the purpose of interfering with the rights and benefits to which they would have been entitled under [ERISA]." The Plaintiffs have not alleged any facts, however, to support their conclusion that the Defendants terminated them in order to interfere with their pension benefits. Because such a conclusory allegation, without more, is insufficient to state a claim under Section 510, the Plaintiffs' ERISA claims are dismissed pursuant to Rule 12(b)(6). *See Mercado Garcia v. Ponce Fed. Bank*, No. RLA 89-0949, 1991 WL 333729, at *5-6 (D.P.R. March 22, 1991); *Clapp v. Greene*, 743 F.Supp. 273, 277 (S.D.N.Y. 1990), *aff'd mem.*, 930 F.2d 912 (2nd Cir.), *cert. denied*, 112 S. Ct. 197 (1991).[2]

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2. Even if the Plaintiffs were able to state a claim, the claims of Plaintiffs C. Adams, Waugh, and Targee are time-barred. ERISA does not provide a specific statute of limitations for actions under Section 510; however, the applicable limitations period, as determined by reference to the Massachusetts statute of limitations governing those causes of actions most analogous to the one set forth in Section 510, is

(Cont'd)

Appendix A

The Amended Complaint also asserts claims on behalf of all the Plaintiffs under the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. § 1962(c) and (d) (1988). Subsection (c) of Section 1962 states, in relevant part:

> It shall be unlawful for any person . . . associated with any enterprise . . . [to] participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection (d) of Section 1962 makes it unlawful to conspire to violate subsection (c). To state a claim under RICO, a plaintiff must allege injury to his "business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1988). RICO was enacted to "cope with the infiltration of legitimate business" by organized crime. *United States v. Turkette*, 452 U.S. 576, 592 (1981). Cognizant of this primary purpose, courts have interpreted the phrase "business of property" to mean only commercial interests. *See, e.g., Hibbard v. Benjamin*, No. CIV. A. 90-10361-WF, 1992 WL 300838, at *3 (D. Mass. Sept. 21, 1992); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F.Supp. 1125, 1137 (D. Mass. 1982). Although a few of the Plaintiffs allege loss of personal assets, none of them allege an injury to a business interest or property related to a business.

(Cont'd)

three years. *See Guiffre v. Delta Air Lines, Inc.*, 746 F.Supp. 238, 240-41 (D. Mass. 1990). C. Adams was terminated on February 8, 1989; Richard Waugh on February 28, 1989; and Elizabeth Targee on August 28, 1989. Thus, they were each terminated more than three years before the filing of this case in January of 1993. The Plaintiffs have alleged no facts to support their argument that the limitations period should be tolled under a theory of fraudulent concealment. *See Berkson v. Del Monte Corp.*, 743 F.2d 53, 55-56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

Because the Plaintiffs therefore fail to state a claim upon which relief may be granted under Section 1964(c), their RICO claims are dismissed.[3]

Having dismissed the Plaintiffs' federal RICO and ERISA claims, this Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3) (Supp. II 1990). The Plaintiffs state law claims are therefore also dismissed. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial, . . . the state claims should be dismissed as well.").

The case is ordered dismissed as to all defendants.

s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge

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3. Even if the Plaintiffs were able to allege a commercial injury, some of the Plaintiffs' RICO claims would still be deficient. A plaintiff must allege injury "by reason of" the alleged racketeering activities to state a claim. 18 U.S.C. § 1964(c). Here, the only conduct alleged in the Amended Complaint that would constitute racketeering activities are the alleged acts of extortion. *See* 18 U.S.C. § 1961(1)). While the following Plaintiffs press theories of wrongful termination and constructive discharge, they do not, however, allege that they were harmed by an act of extortion: Weldon Adams, Brent Adams, Patricia Adams, Tina Levesque, and Robert Ravitz. Because these five Plaintiffs cannot allege injury by reason of "racketeering activities," they do not state claims upon which relief can be granted under the RICO statute.

Further, the RICO claims of an additional three Plaintiffs — Burke, Rapa and Van Winkle — are barred by the applicable four year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc., Pa.*, 483 U.S. 143, 156 (1987). Plaintiff Rapa's cause of action arose in 1982, Plaintiff Van Winkle's in 1985, Plaintiff Burke's in 1987 — each more than four years before this suit was commenced in January, 1993. The RICO claims of these three Plaintiffs are accordingly time-barred.

(3)

No. 97-561

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

LENORA SPAIN, LOUIS HOMESY, WALTER KOZA, THOMAS RICHARD, WILLIAM NAULT, MATTHEW DEMAS, MICHAEL ADAMS, MICHAEL GROVE, LISA HAWKINS, GARY CASTIGLIONI, CHERYL ADAMS, THOMAS RICHARD, MELISSA RAPA, RICHARD WAUGH, WELDON ADAMS, RONALD RING, PATRICIA ADAMS, ELIZABETH TARGEE, MATHEW VAN WINKLE, BRENT ADAMS, ROBERT RAVITZ, TINA LEVESQUE, CARRIE BURKE, WILLIAM CONNORS, DAVID TAYLOR, CHRISTOPHER MORRIS AND KATHLEEN MARTINS,

Petitioners,

vs.

DEMETRIOS HASEOTES, JOHN DROLETTE, ROBERT LANGFORD, JAMES MUMMA, APRIL GREEN, LILY BENTAS, BRYON HASEOTES, JOHN PECK, GEORGE HASEOTES, PETER PANTAZELOS, MARK CURRIER, MARGE OLSEN, WENDY OLSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., FRED BEISSNER AND HARRIET ANTHONY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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I

PETITIONERS CLEARLY AND UNEQUIVOCALLY RAISED THE ISSUE OF ACCRUAL IN THE COURT BELOW, THE FIRST CIRCUIT.

In their Brief for Appellants at pages 34-35 the petitioners stated as follows:

> Not until the summer of 1990, when the news media exposed the CFI scheme, could the employee/ victims discover the facts. That is when their cause of action accrued. *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 208, 557 N.E. 2d 739 (1990). The defendants' concealment of the facts constitutes fraudulent concealment and tolls the statute of limitations. *Shane v. Shane*, 891 F.2d 976, 985 (1st Cir. 1989). Plaintiffs' claims accrued only when the plaintiffs discovered the connection between their harm and the CFI scheme. *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 546, 476 N.E. 2d 595 (1985). Only when the employees learned of the same happenings to other CFI employees could they learn of the causal link between the defendants' conduct and their harm.

PETITIONERS ARGUED IN THEIR BRIEF FOR APPELLANTS IN THE COURT BELOW THAT COLLATERAL ESTOPPEL AND RES JUDICATA CANNOT BE APPLIED TO THEIR RICO CLAIMS WHERE THERE WAS NO FINAL JUDGMENT IN PREVIOUS ACTIONS.

Contrary to the representations of the respondents in their brief in opposition, there has been no judgment of dismissal in *Adams v. Cumberland Farms, Inc.*, No. 91-10627-S, in *Ring v. Haseotes*, No. 93-10051H, or in *Salvatore v. Cumberland Farms, Inc.*, No. 95-11170-EFH. Judge Harrington denied the

respondents motions for summary judgment in the *Ring* case (Appendix). There was no judgment. In the *Adams* case Judge Skinner remanded the case to the state court from which the respondents had removed it before final judgment. The doctrines of claim preclusion and issue preclusion are therefore not applicable, where there was no valid and final judgment. *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987).

CONCLUSION

Petitioners respectfully request this Court to grant Certiorari to review the issues.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED APRIL 23, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.:
93-10051-H

RONALD RING, *ET AL.*,

Plaintiffs

v.

DEMETRIOS HASEOTES, *ET AL.*,

Defendants.

ORDER

April 23, 1993

HARRINGTON, D.J.

After a review of the file in the above-captioned case, the Court rules as follows:

1. Motion of Defendants Demetrios Haseotes, Lily H. Bentas, Byron Haseotes, George Haseotes, Peter Pantazelos, and John Peck, for Summary Judgment against Plaintiff Cheryl Adams is denied;

2. Motion of Defendants James Mumma and John Drolette

for Summary Judgment against Plaintiff Cheryl Adams is denied; and

3. Defendant Jon-Ray Associates, Inc.'s Request from Relief from the Production of Documents is denied.

SO ORDERED.

s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States District Judge